



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 5, 2021

Terence Boga
RWG Law
355 South Grand Avenue, Suite 4000
Los Angeles, CA 90071

Re: Your Request for Advice
Our File No. A-20-155

Dear Mr. Boga:

This letter responds to your request for advice regarding the Political Reform Act (“Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Los Angeles County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

QUESTION

May the Burbank-Glendale-Pasadena Airport Authority (“Authority”) award a design-build agreement to VINCI Construction LLC, where the Authority’s independent contractor for management and service, TBI Airport Management, Inc. (“TBI”), has been integrally involved in the Authority’s Replacement Passenger Terminal (“RPT”) Project and is a subsidiary of the same parent company as VINCI Construction LLC?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

No. Given that TBI serves as the manager of the public airport and participated in making the design-build RPT contract, awarding the contract to VINCI Construction, a subsidiary of the same entity as TBI, would violate Section 1090 due to TBI's prohibitory financial interest in the contract. Thus, Section 1090 prohibits the Authority from awarding the contract to VINCI Construction LLC.

FACTS AS PRESENTED BY REQUESTER

VINCI Construction LLC wishes to participate in a design-build agreement for the Authority's RPT Project. The Authority is a joint powers agency governed by a nine-member Commission. The Authority's independent contractor, TBI, manages all aspects of the Burbank-Glendale-Pasadena Airport ("Airport") and has managed the negotiations and procurement processes relating to the RPT on behalf of the Authority. VINCI Construction LLC and TBI are both subsidiaries of parent company, VINCI SA ("VINCI").

The Authority owns and operates the Airport. The Authority was created in 1977 by the Cities of Burbank, Glendale, and Pasadena to continue the Airport as a public airport facility. The Authority's nine-member Commission is comprised of three representatives of each member city. Other than airport police, the Authority has no employees. Instead, since its formation, the Authority has utilized an independent contractor for airport management services and personnel. TBI has provided these services and personnel for over twelve years and is currently under contract to continue into 2030. TBI provides the services and personnel necessary to operate, administer, inspect, maintain, and supervise the Airport. TBI is also required to negotiate and prepare, on the Authority's behalf and in conjunction with Authority counsel, all agreements required for the Airport's operation. In addition, TBI manages the procurement process for the Authority. TBI prepares bid, qualifications, and proposal solicitations; reviews submittals; and makes contract award recommendations to the Authority Commission.

The RPT Project involves the demolition of an existing Airport passenger terminal and the construction of its replacement. Subject to budget constraints, the project may include construction of ancillary improvements including parking facilities, a replacement airline cargo building, a ground service equipment maintenance building, and a replacement aircraft rescue and firefighting/police/emergency operations center building. TBI staff has been integrally involved in the formation of the RPT Project for several years. To secure the ability to construct the RPT Project, the Authority obtained numerous entitlements from, and executed a development agreement with, the City of Burbank. Negotiation of the entitlements and development agreement took several years. TBI staff, particularly an ex-employee who served as Executive Director of the Authority, played an integral role in the negotiations and in the drafting of contract language and conditions of approval. Burbank voters ratified the entitlements and development agreement at the November 2016 election. TBI staff played an integral role in drafting the Authority's five informational election mailers on the RPT Project, provided to Burbank residents. In May 2019, at the recommendation of TBI staff, the Authority Commission decided to utilize the progressive design-build delivery method for the RPT Project. In November 2019, following a procurement administered by TBI staff, the Authority awarded a contract to AECOM Technical Services

(“AECOM”) for program management and associated services for the RPT Project. The RPT Project currently is on hold due to the COVID-19 pandemic. When it resumes, the first major procurement will be a solicitation for a design-build contractor. This procurement will be administered by TBI staff with assistance from AECOM. It is anticipated that the RPT design-build contract (“RPT contract”) will be \$900 million in value and five years in duration.

VINCI Construction LLC wishes to bid on the RPT contract. TBI and VINCI Construction LLC are subsidiaries of the same parent company, VINCI, a France-registered public limited company and is listed on the Euronext stock exchange in Paris. VINCI has over 3,200 business units that build and operate infrastructure worldwide and is composed of two main divisions: (1) VINCI Concessions; and (2) VINCI Contracting. Each division has its own structure and governance.

TBI is part of the VINCI Concessions division. TBI is a wholly owned subsidiary of TBI PLC (a publicly limited corporation), acquired by VINCI Airports in 2018, a subsidiary of VINCI Concessions. VINCI Construction LLC is part of the VINCI Contracting division. VINCI Construction is a direct subsidiary of VINCI Contracting. VINCI Construction LLC is wholly owned by VINCI Construction Grands Projets, a direct subsidiary of VINCI Construction. The Management Team of VINCI Construction includes a chairman who is also part of the Executive Committee of VINCI, and a chairman for VINCI Construction Grands Projets.

VINCI is highly decentralized and focuses on local business activities with VINCI’s Board of Directors and Executive Management delegating substantial responsibilities to operational managers. Each of VINCI’s divisions can function independently under the supervision of its company officers. VINCI is then responsible for the following: (1) guiding the two divisions in operation expansion efforts; and (2) implementing Management’s overall corporate strategy. VINCI’s overall business strategy is jointly developing its two core businesses, VINCI Concessions and VINCI Contracting. VINCI describes this in the corporate materials provided, as leveraging its “integrated concessions/contracting business model” and using the “synergy in expertise between concessions and contracting businesses to win new infrastructure projects.” VINCI also presents its “group revenue” to include income from VINCI Concessions with VINCI Contracting, and its employees to include the people employed by the two divisions as well. VINCI has afforded TBI employees the ability to be VINCI shareholders.

VINCI’s corporate governance structure includes an Executive Committee (VINCI’s primary operational and functional executives such as the Chairman and CEO of VINCI, the Executive Vice President of VINCI in charge of Contracting, the Chairman of VINCI Construction, and the Chief Executive Officer, VINCI Concessions). It also includes a Management and Coordination Committee composed of the members of the Executive Committee and key operational and functional executives of VINCI’s main companies.

ANALYSIS

Government Code Section 1090

Section 1090 generally prohibits a public officer or employee from making or participating in the making of a contract in which he or she is financially interested. Section 1090 is concerned with financial interests, other than remote interests and noninterests, that prevent a public officer or employee from exercising absolute loyalty and undivided allegiance in furthering the best interests of his or her agency. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) The focus is on the substance, not the form, of the transaction, “disregard[ing] the technical relationship of the parties and look[ing] behind the veil which enshrouds their activities.” (*People v. Watson* (1971) 15 Cal.App.3d 28, 37.) Independent contractors, including corporate consultants, come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal. 5th 230, 245; see also *Davis v. Fresno Unified School Dist.*, (2015) 237 Cal. App. 4th 261, 301.)

TBI is subject to Section 1090, as a corporate consultant with the duty to engage in and advise the Authority on its public contracts. In its role as manager for the Authority, TBI has played an integral role in advising the Authority. Specific to RPT issues, TBI has managed the negotiations on entitlements with the City of Burbank and produced the Authority’s election educational materials to obtain voter approvals. TBI recommended, and the Authority accepted, a progressive design-build delivery for the RPT Project. TBI administered the procurement process resulting in AECOM serving as program manager for the RPT Project. TBI will administer the process for selecting a design-build contractor, with the assistance of AECOM.

TBI in administering the RPT process over the past several years and in administering the process for selecting the design-build contractor has, and will be, participating in making the design-build RPT contract. An officer or employee makes contracts in their official capacities within the meaning of Section 1090 if their positions afford them “the opportunity to ... influence execution [of the contracts] directly or indirectly to promote [their] personal interests.” (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Additionally, the “making” of a contract for the purposes of Section 1090 includes “planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids,” and not just the moment of signing. (*Stigall, supra* at p. 571.) As the managing staff for the Authority, TBI has been integrally involved in the planning and preliminary process for the RPT Project and will be administering the design-build contractor selection process along with AECOM.

At issue is whether TBI would have a “financial interest” under Section 1090 if the RPT contract were awarded to VINCI Construction LLC, due to their common subsidiary status to parent, VINCI. The courts have interpreted “financial interest” broadly in the context of Section 1090 to include “indirect interests and future expectations of profit or loss. (*Sahlolbei, supra* at p. 239, citing *Thomson v. Call* (1985) 38 Cal.3d 633, 645–646.) Whether a proscribed financial interest exists in a public contract is primarily a question of fact. (See, e.g., *People v. Vallerga* (1977) 67 Cal.App.3d 847, 864-866.) In this regard, the case of *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 215 and Attorney General Opinion, 84 Ops.Cal.Atty.Gen. 158 (2001) are instructive. In *Fraser*, the court found a financial interest even where the county official had a 40 percent stock interest in an insurance company that provided

health and accident insurance to the official's county, the contracts at issue did not result in commissions to the official, nor did the commissions offset expenses for the agency. The court found the official had a financial interest in the agency related to the insurance contracts, due to the impacts of the contracts on the agency's financial health, and concluded that the county could no longer contract with the insurance company.

Attorney General Opinion, 84 Ops. Cal. Atty. Gen. 158, *supra*, examined a more distant relationship between a public official and the contracting firm. The official was a 48 percent stockholder, chief executive officer, president, and lessor to an architecture corporation. To avoid a conflict of interest prohibition, one of the three other licensed stockholders of the corporation sought to set up a separate firm to contract with the city. The Attorney General found that even where the official would not be an owner of the separate firm, and the corporation would not share in the profits of the firm, "the financial identity between the corporation and the separate firm would be too pervasive to allow such contracts." (*Id.* at 162.) The Attorney General's reasoning focused on the city contract's indirect and direct impacts on the financial health of the corporation, in which the official had a financial interest.

Drawing on the reasoning in the above matters, TBI would have a financial interest in any contract awarded to VINCI Construction LLC, because they are subsidiaries of the same parent company, VINCI. The \$9 million contract would impact the financial health of its parent, VINCI and VINCI's integrated concessions/contracting business model. Also, TBI cannot claim to have an undivided allegiance to the Authority and the public it serves, where its parent company has a financial interest in the contract decision. Accordingly, given that TBI participated in making the RPT contract, Section 1090 would prohibit the Authority from awarding the contract to VINCI Construction LLC because TBI would have a prohibitory financial interest in it.²

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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² No further analysis is necessary under the Act, due to this determination. However, we note that the finding of a financial interest is consistent with the Act's treatment of parent/subsidiary and other related business entities. An official who has a financial interest in a business entity is generally deemed to have an interest in any parent or subsidiary of the business and other related business entities, broadly defined to include all businesses directed and controlled by the same parent entity. (Regulation 18700.2) There is no indication in the facts that parent company VINCI has other than a controlling interest in its subsidiaries.